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COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,
Petitioner,

v.

CASE NO. PUE010512

**VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION,**

Respondents.

**For a Petition for Declaratory Judgment
and Motion for Injunction**

HEARING EXAMINER'S RULING

December 5, 2001

On September 17, 2001, Northern Virginia Electric Cooperative ("NOVEC") filed a Petition for Declaratory Judgment and Motion for Injunction. Therein, NOVEC petitions the Commission to declare that the proposed sale of electric energy by Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Virginia Power") to the Smithsonian Institution ("Smithsonian") and/or the U.S. General Services Administration ("GSA") for consumption at the Steven F. Udvar-Hazy Center, National Air and Space Museum ("the museum" or "the facility") under construction in Fairfax County, Virginia, is within the service territory of NOVEC, and violates Virginia law and NOVEC's property rights under its certificate of public convenience and necessity granted by the Commission pursuant to the Utility Facilities Act.¹ The Petition names Virginia Power, the Smithsonian, and the GSA as respondents.

NOVEC also petitions the Commission to temporarily and permanently enjoin Virginia Power from selling and delivering directly or indirectly any power or providing any service to the Smithsonian. NOVEC agreed to permit Virginia Power to construct facilities to provide temporary power to the facility during construction, but NOVEC asks the Commission to enjoin Virginia Power from the construction of any permanent infrastructure.² Thus, NOVEC seeks an injunction pendente lite to maintain the status quo while the Commission considers the evidence and rules on the merits of this dispute and the propriety of a permanent injunction.

¹Chapter 10.1 of Title 56 of the Code of Virginia.

²NOVEC Petition at 9-11; Transcript at 6-7.

On October 2, 2001, the Commission issued a Preliminary Order. Therein, the Commission assigned this matter to a hearing examiner, directed NOVEC and Virginia Power to file a joint stipulation of facts and issues upon which they agree and also upon which they disagree, and scheduled an oral argument for October 25, 2001, on the request for an injunction pendente lite.

On October 12, 2001, Virginia Power filed an Answer denying that its sale of electricity to the Smithsonian violates Virginia law and a Counter Petition seeking a declaration that it has the statutory and legal obligation to provide service to the entire Smithsonian facility. Virginia Power simultaneously filed a Memorandum in Opposition to the Motion for Injunction.

Also on October 12, 2001, the Smithsonian and the GSA, by counsel, accepted the Commission's invitation to offer comments on the matter in dispute.³ The Smithsonian addressed its practical concerns and support for Virginia Power to provide service to the new museum. It has contracted with Virginia Power to provide that service. In its Response, the Smithsonian emphasized that its paramount and practical concern is that the phased construction schedule of the museum not be compromised. It asserts that only timely completion of each phase of the project will ensure that the facility will open in December 2003, the centennial of the first powered flight by the Wright Brothers on December 17, 1903. That opening date is significant because (1) many individual and corporate donors who provided funding expect completion of the museum by that anniversary date; (2) the project's time line for completion could be endangered by scheduling changes; and (3) the museum plans to take advantage of the unique educational opportunities associated with opening on the centennial of the Wright Brothers' first flight.

The planned delivery of Virginia Power's first transformer in November 2001 is part of the construction schedule and is on the project's critical path. Installation will make permanent power available to the contractor beyond the current and temporary power capacity. The contractor must have that additional power by April 1, 2002, to permit construction and start-up of mechanical and electrical equipment necessary for construction of the museum's buildings.

The Smithsonian also addressed several practical concerns that go to the ultimate question presented in this case. Specifically, it identifies construction and costs that have been undertaken in anticipation of Virginia Power providing service. If the Commission concludes that NOVEC is the proper provider, this work would have to be reconsidered, which would also cause delays.

On October 18, 2001, NOVEC and Virginia Power filed a joint stipulation of facts upon which they could agree and to which they disagree ("Joint Stipulation"). There remain critical questions of fact upon which the parties cannot agree.

³The GSA is the record landholder for the property on which the facility is being constructed. (Petition at 4). The United States' Response, however, noted that the GSA has played no role in the events that have led to the dispute in this case. (Response at 2, n. 1).

By hearing examiner ruling dated October 22, 2001, a Motion for Leave to Participate filed by Old Dominion Electric Cooperative (“ODEC”) and the Association of Virginia, Maryland and Delaware Cooperatives (the “Association”) was granted.

On October 24, 2001, NOVEC filed several affidavits. On October 25, 2001, before the scheduled oral argument, NOVEC also filed a pre-hearing memorandum.

At 10:00 a.m. on October 25, 2001, an oral argument was held on NOVEC’s motion for injunction pendente lite. Appearances were entered by William Bradford Stallard, Esquire, and JoAnne L. Nolte, Esquire, on behalf of NOVEC; E. Duncan Getchell, Jr., Esquire, Kodwo Ghartey-Tagoe, Esquire, and John D. Sharer, Esquire, on behalf of Virginia Power; Steven E. Gordon, Assistant U. S. Attorney on behalf of the U.S. Government, Smithsonian, and the GSA; James P. Guy, II, Esquire, and John A. Pirko, Esquire, on behalf of ODEC and the Association; and Sherry H. Bridewell, Esquire, and Wayne N. Smith, Esquire, on behalf of Staff. Staff and the parties presented arguments in support of the positions taken in their filed pleadings, and on November 1, 2001, Staff and the parties filed post-hearing memoranda.

STIPULATION AND AFFIDAVITS

In the Joint Stipulation, NOVEC and Virginia Power agree that NOVEC is a Virginia electric distribution cooperative, that Virginia Power is a Virginia public service corporation, and that the Smithsonian was created by an Act of Congress to serve the public. They agree that the Smithsonian is constructing a National Air and Space Museum annex at the Dulles Airport. They also stipulate that Virginia Power is currently providing temporary power to the facility. They independently recognize that the museum will have several points of electric usage including a hangar, an IMAX theatre, a chiller, and a parking lot.⁴

The list of facts to which they disagree is much longer. NOVEC contends that all or virtually all of the buildings are solely in its certificated territory. NOVEC alleges that the “footprint” of the facility, and the bulk of the load to be consumed, would be located in its service territory. Virginia Power asserts that the majority of the Smithsonian’s property lies in its service territory and that all buildings that constitute the museum are wholly or partially in its territory.

NOVEC alleges that it began to work with the Smithsonian on or about August 6, 1996, to obtain specifications for the proposed facility.⁵ The Cooperative avers that it periodically informed the Smithsonian that the bulk of electric power usage was in NOVEC’s certificated territory, and it was therefore the proper entity to provide service. NOVEC further contends that it learned on or about January 25, 1999, that Virginia Power was also working with the Smithsonian.⁶ On November 22, 2000, NOVEC, through ODEC, requested a new delivery point pursuant to the Interconnection and Operating

⁴ NOVEC Petition Exhibit 2; Virginia Power Answer and Counter Petition at 6; Joint Stipulation at 3, 11-13.

⁵ Joint Stipulation at 3.

⁶ Id. at 6.

Agreement (“the Agreement”) between ODEC and Virginia Power.⁷ That request was denied on April 6, 2001. According to NOVEC, its request was denied because the Smithsonian had requested service from Virginia Power.⁸ NOVEC continues to maintain that it is willing and able to serve the Smithsonian facility, and that it has the exclusive duty and obligation to provide such service.

NOVEC submitted the affidavits of James C. Moxley, Peter G. Moore, and Gilbert Jaramillo. Mr. Moxley addressed the Agreement between ODEC and Virginia Power, and stated that NOVEC was ready, willing and able to provide service to the Smithsonian.⁹ Mr. Moore, a Virginia land surveyor, stated that there are certain limiting factors that preclude exact calculations, however, it was his opinion that approximately 95% of the Smithsonian’s structures are within NOVEC’s service territory.¹⁰ Mr. Jaramillo stated that he works with rate design, studies cost of energy distribution and generation, produces analyses of project loads, and conducts financial analyses regarding NOVEC’s service to its customers.¹¹ He calculated the projected revenue NOVEC would receive if it served the Smithsonian facility and determined that providing electricity to the facility would result in gross revenue to NOVEC of approximately 1.4 million dollars per year. Assuming a five-megawatt load, and a load factor of 70%, the yearly distribution revenue alone would exceed \$225,000 to NOVEC based upon applicable rate schedules the Cooperative would use for similarly situated customers.¹²

James Moxley also submitted a supplemental affidavit after the oral argument stating that based on NOVEC’s experience, it projects that it will take 14 to 21 days to install permanent service, assuming the availability of the appropriate equipment including transformers and electric cable. He affirmed that NOVEC “can perform the necessary work to meet the projected April 1, 2002 date for permanent service, providing NOVEC has timely access to the current service, and technical specifications which will enable NOVEC engineers to confirm assumptions about the requirements.”¹³

ODEC submitted the affidavit of D. Richard Beam who also addressed a delivery point for NOVEC and the Agreement.¹⁴

Virginia Power contends the Smithsonian has expressed a preference for service from Virginia Power, that NOVEC did not object to Virginia Power currently providing temporary power, and that it is of paramount importance that the phased construction schedule not be compromised. It contends that not permitting Virginia Power to begin

⁷ Id.

⁸ Id. at 7.

⁹ Moxley affidavit, October 24, 2001.

¹⁰ Moore affidavit, October 24, 2001.

¹¹ Jaramillo affidavit, October 24, 2001.

¹² Jaramillo affidavit, October 24, 2001.

¹³ Moxley affidavit, November 1, 2001.

¹⁴ Beam affidavit October 24, 2001.

construction of permanent facilities would harm its ability to ensure timely delivery of permanent power to the Smithsonian in accordance with its needs.¹⁵

John Caskey, the Virginia Power account manager for the Smithsonian, tried to determine where the service territory boundary crosses the Smithsonian site. He was unable to locate the northeast corner of the NOVEC service territory because the point is well within the airport property. However, he determined that the greater part of the Smithsonian's real property, the IMAX theater and the entire parking lot are in Virginia Power's territory and that part of the hangar is also in its territory.¹⁶ He admitted that it was not possible to calculate the particular percentage of the hangar area in each utility's area because the northeast corner of the boundary could not be located on the ground.

Virginia Power also filed the Declaration of Justin Estoque, the project manager for construction of the museum employed by the Smithsonian. Mr. Estoque addressed why it is of paramount and practical importance that the construction schedule not be compromised. He confirmed that the schedule requires permanent power connection at the latest by the beginning of April 2002.¹⁷

Virginia Power challenges NOVEC's assertion that it is able to provide service, because it has not received a delivery point from Virginia Power. Moreover, Virginia Power contends that resolution of any dispute over a delivery point falls outside the jurisdiction of this Commission.¹⁸ It argues that the Agreement between it and ODEC is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

After the oral argument, Virginia Power submitted the affidavits of Rebecca H. Buchanan, Tim Parsons, and a supplemental Declaration of Justin Estoque. Ms. Buchanan confirmed that all proposed permanent distribution facilities to be owned by Virginia Power would be installed within its service territory and electric service would be delivered to the Smithsonian entirely within that territory. The temporary facilities now in place would be removed and no Virginia Power facilities would remain in NOVEC's service territory. She anticipated that the construction of the permanent electrical facilities to serve the Smithsonian would take approximately ten working days.¹⁹ Mr. Parsons confirmed that he performed the Global Position Satellite ("GPS") work discussed by Mr. Caskey in attempting to locate service boundaries.²⁰ Mr. Estoque stated that the Smithsonian has planned for both normal and alternate power sources at the museum to minimize the risk of power failure that would endanger its collections and the visiting public, and that Virginia Power had agreed to provide it.²¹

¹⁵ Virginia Power Memorandum in Opposition to Motion for Injunction, October 12, 2001; Estoque declaration, October 24, 2001.

¹⁶ Caskey affidavit, October 12, 2001.

¹⁷ Estoque declaration, October 24, 2001.

¹⁸ Transcript 79-80.

¹⁹ Buchanan affidavit, November 1, 2001.

²⁰ Parsons affidavit, November 1, 2001.

²¹ Estoque declaration, November 1, 2001.

DISCUSSION

Legal Standard for Temporary Injunction

The parties first differ on the standard that the Commission should apply as it considers the pending request for a temporary injunction. NOVEC asserts that §§ 12.1-13, 56-6, 56-265.3 and 56-265.4 of the Code of Virginia authorize the Commission to issue a preliminary injunction if it finds that NOVEC is likely to succeed on the merits in this proceeding.²² NOVEC argues that the precedent established in two Commission cases²³ decided in 1998 and 1999, respectively, mandates the conclusion that it, not Virginia Power, has the obligation and right to serve the Smithsonian. In both cases the Commission applied a point of use analysis to conclude that the right of a utility to serve the customer in those cases was determined by the service territory in which the customer would use the electricity. NOVEC contends that application of that precedent to this case yields the clear conclusion that Virginia Power's attempt to serve the Smithsonian violates Virginia law and that such violation should be enjoined.

Virginia Power and Staff contend that the proper standard to apply to the request for a temporary injunction requires the equitable balance of four factors including: harm to the movant, harm to the respondents, the likelihood of success of the merits, and the public interest.²⁴

Clearly, as NOVEC contends, the Commission has the authority to issue both a preliminary and a permanent injunction. Article IX, section 3 of the Constitution of Virginia provides that "[I]n all matters within the jurisdiction of the Commission, it shall have the powers of a court of record..." More specifically, Section 12.1-13 of the Code of Virginia provides that "[I]n the administration and enforcement of all laws within its jurisdiction, the Commission shall have the power ... to issue temporary and permanent injunctions."

NOVEC argues that when a statute expressly empowers a court to grant injunctive relief against its violation, no showing of irreparable harm is necessary. Indeed, in *Virginia Beach S.P.C.A. v. South Hampton Roads*, 229 Va. 349 (1985), the Virginia Supreme Court sustained a permanent injunction issued against the S.P.C.A. to prohibit the practice of veterinary medicine without a license. The applicable statute expressly empowered the courts to enjoin the unlawful practice of veterinary medicine,²⁵ and the Court concluded that once a court finds a person is engaged in the unlawful practice of veterinary medicine it has the power to enjoin that practice. It held that:

When a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional prerequisites, i.e., irreparable

²²Transcript 45; NOVEC Supplemental Memorandum filed November 1, 2001.

²³ *Prince George Electric Cooperative v. RGC (USA) Mineral Sands, Inc.*, Case No. PUE960295, 1998 S.C.C. Ann. Rep. 344 (the "Prince George case") and *Petition of Kentucky Utilities Company*, Case No. PUE960303, 1999 S.C.C. Ann. Rep. 368 (the "Kentucky Utilities case").

²⁴Virginia Power and Staff Post-hearing Memoranda filed November 1, 2001.

²⁵ Virginia Code section 54-786.7.

harm and lack of an adequate remedy at law, before the injunction can issue. All that is required is proof that the statute or regulation has been violated.²⁶

In *Carbaugh v. Solem*, 225 Va. 310 (1983), the Virginia Supreme Court also held that an injunction could be issued without a finding of irreparable harm. There the Court found that a showing of violation of the statute²⁷ prohibiting the sale of unpasteurized milk was sufficient grounds for an injunction. The Court held that when the “General Assembly determines that certain conduct is inimical to the public interest, a petition for an injunction ‘need not contain an allegation of “irreparable injury.””²⁸ Thus the General Assembly had already weighed the equities by permitting injunctive relief under the facts specified in the statute.²⁹

The Commission has issued injunctions after application of this standard when a statute expressly provided for injunctive relief from its violation. The Virginia Securities Act,³⁰ for example, includes an express provision authorizing the Commission to issue an injunction “against any violation or attempted violation” of any provision of that Act.³¹ The Commission has relied on that statute to issue temporary injunctions upon a showing that a statute therein had been violated.³²

In the Utility Facilities Act, Virginia Code § 56-6 provides that:

[a]ny person...aggrieved by anything done...in violation of any of the provisions of [Title 56] by any public service corporation...shall have the right to...seek relief by petition...If the grievance... [is] established, the Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this law,...

The Commission has considered a balance of equities in one case considering the abandonment of facilities under section 56-265.1 (b) (1).³³ The Commission found that abandonment of a sewer system would result in irreparable harm to the public if not enjoined, and would violate the Utility Facilities Act.

The Commission, however, has also applied the standard urged by NOVEC to enjoin a public service corporation from violation of the Utility Facilities Act. The

²⁶ *Virginia Beach S.P.C.A. v. South Hampton Roads*, 229 Va. 349, 354 (1985).

²⁷ Virginia Code section 3.1-530.8.

²⁸ *Carbaugh* at 315 (quoting *WTAR Radio-TV v. Virginia Beach*, 216 Va. 892, 894 (1976)).

²⁹ *Id.* at 315.

³⁰ Virginia Code section 13.1-501 *et seq.*

³¹ Virginia Code section 13.1-519.

³² *Bright Cove Securities, Inc.*, Case Nos. SEC010111 & SEC010120, Order (October 24, 2001) and *Commonwealth of Virginia, ex rel. State Corporation Commission v. Aircable of Roanoke, LLC, Digital Broadcast Corporation*, Case Nos. SEC000069 & SEC000072, Hearing Examiner’s Report (December 19, 2000).

³³ *Commonwealth of Virginia, ex rel. State Corporation Commission v. Ruby and Sam Donaldson, Jr., t/a the Donaldson Sewer System*, Case No. PUE8810084, Order (September 9, 1988).

Commission enjoined VYVX of Virginia, Inc. ("VYVX") from exercising eminent domain authority to condemn and acquire property and constructing facilities before it obtained a certificate of public convenience and necessity. The injunction, however, was issued only after the Commission found that VYVX was not lawfully authorized to operate until such time as the Commission had acted upon its application for a certificate.³⁴

Thus, the Commission has not always applied the equitable balance of factors if a statute expressly empowers injunctive relief to prevent continuing violation of the statute, and the Commission has before it affirmative proof that the statute has been violated.

Although NOVEC contends that all it need show is that its statutory right to a franchise is threatened or has likely been violated for the Commission to issue a preliminary injunction in this case, the very cases it cites appear to require more. This standard requires NOVEC to prove that a statute has been violated. The Commission may ultimately conclude that NOVEC has the superior right to serve this customer, but NOVEC has made no prima facie showing that the Utility Facilities Act has been violated by Virginia Power to support a preliminary injunction. To the contrary, both Virginia Power and NOVEC hold certificates of public convenience and necessity authorizing them to provide electric service in Fairfax County, and specifically to the Smithsonian property. Both utilities therefore have a valuable property right that may be affected and is entitled to protection.³⁵ Moreover, Virginia Power has represented that it will not extend service lines inside NOVEC's certificated service territory to provide permanent service to the museum.

The standard urged by Virginia Power and Staff requires a balance of several considerations, and I find that, absent an affirmative showing that a statute has been violated, it is the proper standard to apply in deciding whether NOVEC is entitled to a temporary injunction. The courts in Virginia have generally applied this standard which was first established by the Fourth Circuit in the *Blackwelder* case.³⁶ The consideration of four specific factors thus should govern the decision to grant a preliminary injunction. Those factors are:

1. the likelihood of irreparable harm to the plaintiff if the injunction is denied;
2. the likelihood of harm to the defendant if the relief is granted;
3. the likelihood that plaintiff will succeed on the merits; and
4. the public interest.³⁷

The balance of hardships is the most important determination in applying the *Blackwelder* factors.³⁸ The degree to which the petitioner must show its likelihood of success on the merits to obtain the injunction varies inversely with the probability of irreparable harm.³⁹ If the balance of harm favors the petitioner, a preliminary injunction can be granted if the petitioner has raised questions going to the merits so serious, substantial, difficult and

³⁴ *Application of VYVX of Virginia*, Case No. PUC970047, Order (November 25, 1997).

³⁵ *Town of Culpeper v. VEPCO*, 215 Va. 189 (1974).

³⁶ *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977).

³⁷ *Id.* at 193.

³⁸ *Id.* at 196.

³⁹ *Id.*

doubtful, as to make them fair ground for litigation.⁴⁰ As the balance tips away from the petitioner a stronger showing on the merits is required.

Balance of Harm

Thus, I first must consider whether NOVEC faces irreparable harm, harm that is neither remote nor speculative, but actual and imminent. The Virginia Supreme Court has held that irreparable harm does not require “that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages.”⁴¹

NOVEC contends that this case involves a “matter of principle,” and that it will suffer significant and irreparable harm. It argues that it will suffer lost revenues, its planning process will be jeopardized, and that if not enjoined now, Virginia Power will be encouraged to employ similar tactics to steal other customers.⁴²

Virginia Power asserts that there is no threat of irreparable harm to NOVEC.⁴³ Virginia Power contends that any potential harm to NOVEC is offset by the same potential harm that could be caused Virginia Power if it were enjoined from selling power to the Smithsonian.

Staff avers that adequate remedies are available to address any potential harm faced by NOVEC.⁴⁴

In the *Prince George* case, the Commission ultimately found that the cooperative had the exclusive right to sell power to the customer, but Virginia Power had the facilities in place and was selling power to the customer at the time of that decision. The Commission ordered the parties to effect the orderly transfer of the facilities. Virginia Power contends that similar relief would be sufficient in this case as well.⁴⁵ Counsel for NOVEC argues that it would not be sufficient but he could not adequately explain why the same relief would not be appropriate in this case.⁴⁶ Further, the Smithsonian is a customer that under Virginia Code section 56-234 would not be subject to the Commission’s rate or service authority, thus any dispute over lost revenues could be resolved in an action at law.

Virginia Power admits that any potential harm to it resulting from a temporary injunction is no more than that faced by NOVEC absent such an injunction. It also considers this dispute a matter of principle and a challenge to its right to serve under its certificate. It too could suffer lost revenues if enjoined. I agree. I find that any potential harm is the same for both parties, and the facts presently in evidence do not demonstrate

⁴⁰ *Id.*

⁴¹ *Calloway v. Webster*, 98 Va. 790 (1900).

⁴² NOVEC Pre-hearing Memorandum at 10-11; Transcript at 53.

⁴³ Virginia Power Post-hearing Memorandum at 3.

⁴⁴ Transcript 26.

⁴⁵ Transcript 84.

⁴⁶ Transcript at 52-55.

that NOVEC or Virginia Power will be irreparably harmed. Adequate remedies are available to either party.

The potential harm faced by the customer, however, is significant and would be irreparable. The Smithsonian has clearly defined the timely availability of permanent power as critical to maintaining the construction schedule designed to assure that the museum, a national air and space museum of wide renown, opens in December of 2003, in celebration of the centennial of the first flight of the Wright Brothers. An interruption in the construction schedule due to the failure to have permanent power available by April of 2002 could affect that opening. Any delay would cause the loss of the opportunity to commemorate this centennial in such a fitting manner forever. There would be no remedy available to compensate for that loss.

Moreover, both NOVEC and Virginia Power have been aware of this territorial dispute for some time and chose not to bring it to the Commission until October of 2001. Despite their delay, the Commission has expedited consideration of this dispute, and a hearing on the merits is set for December 11, 2001.

Likelihood of success

As the potential harm to the Smithsonian is significant and irreparable, I conclude that NOVEC must make a very strong showing of its likely success on the merits to support a temporary injunction in this case. There certainly is a chance that NOVEC will prevail on the merits. The evidence shows that there are power requirements related to the facilities in NOVEC's service territory.⁴⁷ Application of the point of use analysis that the Commission considered in the *Prince George* and *Kentucky Utility* cases may ultimately support at least a portion of NOVEC's contention. Some, but not all of the use, would appear to fall in NOVEC's territory and thus strict application of a point of use analysis could support the conclusion that NOVEC was entitled to serve at least the specific points of use in its territory. However, as Virginia Power observed, the Commission clearly stated that it was not establishing an absolute test in the *Prince George* case, and cautioned that it would always consider the practical realities of each situation.⁴⁸

There are several important differences in the practical realities in the case now before the Commission. NOVEC's chance of success here is not certain. Unlike the *Prince George* case, two-thirds of the Smithsonian property and several points of use are in Virginia Power's service territory. In the *Prince George* case, the customer had acquired a narrow strip of land representing only .4% of its total property for the sole purpose of reaching an alternative electric provider. No points of use were in the alternative provider's territory in that case. Here, the customer did not manipulate the delivery point to reach Virginia Power. Rather a significant portion of the real property and some of the museum facilities lie in Virginia Power's territory. Virginia Power has existing facilities closer to the points of use, and NOVEC's territory itself is a strip of land approximately 400 yards wide bounded on three sides by Virginia Power territory. Virginia Power is in a position to

⁴⁷ Transcript 38-40.

⁴⁸ Virginia Power Memorandum in Opposition to Motion for Injunction, at 4.

provide timely service to the customer. The practical ability of NOVEC, however, to timely provide service is a matter of factual dispute. NOVEC must cross several hurdles before it can provide any service to the Smithsonian, including acquiring a delivery point from Virginia Power, an issue in dispute and beyond this Commission's jurisdiction. NOVEC and ODEC argue that the dispute over the delivery point will "go away" if the Commission concludes that NOVEC has the superior right to serve the Smithsonian, and that the FERC would likely decline to exercise jurisdiction over the contract dispute and defer action to the state.⁴⁹ In that case, the dispute would be resolved in a state circuit court, but it still would not come before the Commission. Also, and importantly, no action has been taken in any forum to resolve this critical controversy.

The Public Interest

The Smithsonian was created by an Act of Congress. Congress granted a charter to it in 1877 as an "establishment... for the increase and diffusion of knowledge among men...."⁵⁰ The new facility will be available to serve the public in that endeavor. It is clearly in the public interest for the facility to open and to open on time to celebrate the centennial of the Wright Brothers' first powered flight. Time is critical as the facility's opening in December 2003 is scheduled to coincide with the centennial anniversary of the Wright Brothers' historic flight. Any risk that the museum opening might be delayed must be avoided.

FINDINGS AND CONCLUSIONS

1. Significant and irreparable harm to the Smithsonian, one of the respondents, could result from a delay in the scheduled opening of the new museum;
2. There are remedies available, albeit at some cost, to NOVEC if the Commission ultimately finds in its favor;
3. There is some likelihood that NOVEC will prevail, at least in part, based on the point of use test applied in the *Prince George* case, but there are significant differences in this case that make the outcome far less than certain;
4. Any likelihood of success does not offset the irreparable harm that could face the Smithsonian if a temporary injunction were granted; and
5. The public interest, educational opportunities, and the interests and expectations of the benefactors of the facility will be adversely affected if this new museum of undisputed national importance and reputation fails to open on the centennial anniversary of the Wright Brothers' historic first flight.

Accordingly, NOVEC's motion for an injunction pendente lite is **DENIED**.

Deborah V. Ellenberg
Chief Hearing Examiner

⁴⁹ Transcript at 67.

⁵⁰ 20 U.S.C. § 41.